Office-Supreme Court, U.S.
FILED
MAR 25 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 852

MAUDE H. LAMAR, Personally and As Executrix of the Estate of FREDERICK C. LAMAR, Deceased,
Petitioner,

vs.

EDWIN O. BOOKWALTER, District Director of Internal Revenue,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Where a court of appeals has decided an important question of Federal law which has not been but should be settled by this Court, the Court may, in the exercise of sound judicial discretion, review the decision of the court below. The petition herein demonstrates that the court

1. pp. 12-29

of appeals has misinterpreted and misapplied the law of Missouri. The petition further shows the Court of Appeals for the Eighth Circuit has rendered two decisions that are incompatible and in conflict within the circuit notwithstanding similarity of factual and legal issues respecting an important element in the assessment and collection of federal estate taxes.[2] What the respondent thinks is not important. What this Court thinks and does relative to this case is important. There is ample precedent for the granting of the writ. *Blair* v. *Commissioner*, 300 U.S. 5 (1937); *Riggs* v. *Del Drago et al.*, 317 U.S. 95 (1942); *Helvering* v. *Stuart*, 317 U.S. 154 (1942).

The respondent in a memorandum in opposition peremptorily ignores the obvious misinterpretation and misapplication by the court of appeals of the law of Missouri in construing the will of the petitioner's deceased husband. The respondent seeks elimination of consideration by this Court solely on the basis of an unsupported generalization that whether the court below correctly construed the will is not a question warranting review by this Court.

The petitioner does not seek review by this Court for the purpose of interpreting the will, as that is the business of the district court, which has properly performed its function. The petitioner seeks certiorari on a question, not heretofore passed upon by this Court, respecting assessment and collection of federal estate taxes concerning which much conflict and confusion exist.[3]

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2. pp. 30-32.

3. See, for example: *Kasper* v. *Kellar*, 217 F.2d 744 (C.A. 8, 1955); *Robertson* v. *U. S.*, 310 F.2d 199 (C.A. 5, 1962); *U. S.* v. *Mappes*, 318 F.2d 508 (C.A. 10, 1963); *Bucklaiter* v. *Lamar*, 323 F.2d 664 (C.A. 8, 1963).

Compare: *Steele* v. *U. S.*, 146 F. Supp. 316 (D.C. Mont., 1956) and *Estate of William David Frederick*, 21 T.C.M. 480 (Mont., 1962).

Admittedly, uniformity in the various States may not exist in determination of the extent of an interest of a surviving spouse in a testamentary grant so as to ascertain whether a particular grant is or is not subject to a terminable interest within the purview of the Internal Revenue Code. Uniformity *must* exist, however, in the interpretation and application of the laws of the States. It is absent in the Lamar case insofar as it relates to the applicability of 2056 (b)(1)(A) and (B) of the Internal Revenue Code. No distinction has been made by the courts in cases wherein an *absolute* grant is made, as in *Lamar*, and a *conditional* grant is made, as in *Mappes, supra* (fn. 3). The grant in Lamar was, "I give, devise and bequeath all of the rest, residue and remainder of my property * * * to my wife, Maude H. Lamar, to have and to hold as her property *absolutely*." The language of the following paragraph was, "In the event, however, that my wife, Maude H. Lamar, shall die prior to my death and shall not survive me, or in the event that she shall die simultaneously with myself or as the result of the same common accident or calamity to both of us, or *if she shall not survive the administration of my estate*, * * *" (italics added) then followed a grant to others.

The grant in *Mappes* was, "I give, devise and bequeath to my wife, *if* living at the time of my death * * *" (italics added), then followed in the next paragraph, "In the event my wife should predecease me, or should die

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In Steele the conditional clause was "In the event my said wife * * * should not be living at the time of the distribution * * *". The district court held the grant was not terminable, hence it qualified for a marital deduction. In Frederick, decided by the Tax Court of the United States, the conditional clause was, "that she survive the period of probate". The Tax Court held the interest to be terminable, thus not qualifying for a marital deduction.

before my estate has been administered, then in that event * * *", then followed a grant to others (italics added).

The court of appeals in Lamar, notwithstanding the distinction, not only in fact but in law, vis-a-vis Oklahoma and Missouri, observed that the facts and circumstances in Mappes, "where the issue was also whether a widow was entitled to a 'marital deduction' are remarkably similar to those of the instant (Lamar) case" l.c. 671. Reliance, as expressed above, constitutes a conflict, in that inferentially the law of Oklahoma patently was of more weight in deciding Lamar than that of Missouri. As stated by the court of appeals in Lamar, "It (Mappes) is nevertheless persuasive authority" l.c. 671.

In Lamar the court of appeals has exceeded the limitations of the regulations published by the Commissioner of Internal Revenue where the interest of the spouse is conditioned on survival. Illustrating the application of Section 2056(b)-3 of the Internal Revenue code is example 4 of T.D. 6296; 1958-2 C.B. 432, 568, wherein it is stated that a grant "to his wife if she was living on the date of the distribution of his estate" is a non-deductible interest. Note, however, the absence of any reference in this or any other pertinent regulation to an absolute grant to have and to hold absolutely, as in Lamar, followed by such a qualification as above. Under such circumstances the interest qualifies as a deductible grant and there is no regulation to the contrary.

As stated, some courts, including the Tax Court of the United States, have not only gone beyond the limitations of the Internal Revenue Code but also of the regulations issued by the Commissioner pursuant thereto.

The petition for certiorari should be granted by this Court.

Respectfully submitted,

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